EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
COMMONWEALTH OF KENTUCKY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

Larry H. Marshall
COUNSEL FOR PETITIONER

JOANNE M. YANISH
ASSISTANT PUBLIC ADVOCATE
COMMONWEALTH OF KENTUCKY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

Joanne M. Yanish
OF COUNSEL

August 9, 1985

2 pp

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A STATE TRIAL COURT ERR WHEN, OVER THE OBJECTION OF A BLACK DEFENDANT, IT SWEARS AN ALL WHITE JURY CONSTITUTED AFTER THE PROSECUTOR HAD EXERCISED FOUR OF HIS SIX PEREMPTORY CHALLENGES TO STRIKE FOUR OF THE FIVE BLACK VENIREMEN FROM THE PANEL IN VIOLATION OF CONSTITUTIONAL PROVISIONS GUARANTEEING THE DEFENDANT AN IMPARTIAL JURY AND A JURY COMPOSED OF PERSONS REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY AND EQUAL PROTECTION OF THE LAW?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONT'D.)

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

The petitioner, Randall Lamont Griffith, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on June 13, 1985.

OPINIONS BELOW

No written opinion was rendered by the Jefferson County, Kentucky Circuit Court. Following a jury trial, petitioner was convicted of First Degree Robbery [Ky.Rev.Stat. (KRS 515.020)] and Second Degree Persistent Felony (KRS 532.080) on May 16, 1984 (Transcript of Record, hereinafter TR 114, 119). On May 21, 1984, the Jefferson Circuit Court entered final judgment, sentencing petitioner to twenty (20) years imprisonment. (TR 137-138; Appendix, hereinafter A 2,3-4).

By Opinion rendered June 13, 1985, the Supreme Court of Kentucky affirmed petitioner's conviction. The case was styled, Randall Lamont Griffith v. Commonwealth of Kentucky, No. 84-SC-1001-MR. The Opinion was issued as one "not to be published."

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3). The Supreme Court of Kentucky affirmed petitioner's conviction in an unpublished Opinion rendered June 13, 1985. This Petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed***

FOURTEENTH AMENDMENT, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Randall Lamont Griffith, was indicted on September 27, 1982, for first degree robbery and theft by unlawful taking as well as persistent felony offender in the second degree (TR 1-2). The indictment charged that petitioner had committed robbery by "threatening the use of physical force upon Ms. Collett Ruhl while armed with an ice pick, a dangerous weapon" on or about September 8, 1982 (TR 1). The object of the theft was a purse belonging to Deborah Barnett (TR 1). Ms. Barnett and Ms. Ruhl (later called Weist) were together at the time of the incident (Transcript of Evidence, Volume I, hereafter TE I 37, 44-45).

Petitioner's case first proceeded to trial on February 21 and 22, 1984 (TR 83). A mistrial was declared after the jury reported they were unable to reach a unanimous verdict (Id.). Petitioner's case proceeded to trial for the second time on May 15, 1984 (TE I, Cover Page).

On the day of trial, [1] a jury panel was presented for examination and, in accordance with Kentucky practice, each party

[1] For the convenience of the Court, the pertinent parts of the trial record are set out in the Appendix.

was allowed to exercise peremptory challenges. [Kentucky Rules of Criminal Procedure (RCr) 9.36(2)(3)]. (TR 94-96). Under the rules of court in Kentucky, the prosecutor was allowed five peremptory challenges and one extra peremptory due to the calling of extra jurors for examination. [RCr 9.40(1)(2)]. The prosecutor used his peremptory strikes to strike four black jurors (Supplemental Transcript of Evidence, hereinafter STE 38).[2] Following the prosecutor's strikes, one black juror remained (STE 41). However, after random selection by the Clerk pursuant to Kentucky Criminal Rule (hereinafter, CR) 9.30, no blacks remained on the panel (STE 41). As defense counsel, Leo Smith, argued, the result was:

> ...[The] defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury...(STE 41).

Defense counsel moved the trial court to require the prosecutor, Joseph Gutmann,[3] to state his reasons for exercising his peremptories for the record (STE 35, 37, 40, 41). Mr. Smith also moved for discharge of the panel on the basis of a violation of his client's constitutional right to jury made up a fair cross section of the community (STE 38, 40). Both defense motions were overruled (STE 40, 42). The jury was then sworn for service on Mr. Griffith's case (TE I 35).

Collett Wiest testified that on September 8, 1982, she and Deborah Barnett stopped on Poplar Level Road near the Magic Mart to use the telephone at the phone booth (TE I 36-65). Ms. Barnett asked Ms. Wiest to bring her purse from the car, which she did (TE I 43). Barnett got her cigarettes from her purse and tossed the purse to the hood of the car where Ms. Wiest was sitting (Id.). While Ms. Wiest was sitting on the hood of the

---

[2]One of those four black panel members had also been struck by the defense (STE 38, TR 94).

[3]Mr. Gutmann is the same Commonwealth Attorney who prosecuted the case of Batson v. Kentucky, No. 84-62-6263, presently pending before this Court on certiorari. In Batson the defendant challenged the swearing of an all white jury after the prosecutor exercised his peremptory challenges to strike all of the black venireman from the panel.

car, a black male with a short afro, between 5'5" and 5'7" and 150 lbs. walked up to Ms. Barnett's purse, put his hand on the purse and held a knife up to Ms. Wiest, picking up the purse (TE I 44-45). He then put the purse under his arm and walked back to the apartment behind them (TE I 46). Ms. Barnett testified similarly. She also testified to her pretrial identification of petitioner from a photopack.

Stephanie Kittrel, according to her testimony, was on her way to the store when she saw a man grab a lady's purse (TE II 134). She saw that man draw a knife on the woman (Id.). She made an in court identification of petitioner (TE II 136). According to Kittrel, the man who took the purse lived in the apartments near her (TE II 136). On cross-examination she admitted that two or three weeks later she notified police that she saw a man who resembled the man involved in the robbery (TE 145). Later during petitioner's testimony he testified he was in jail following his arrest September 17 through October 1982 (TE II 201). Two police detectives also testified concerning the identification of petitioner by the witnesses (TE I 153-16).

Based on the evidence, the jury returned a verdict of guilt on the charge of first degree robbery, recommending a punishment of ten (10) years (TE II 247-248). The punishment was enhanced pursuant to Kentucky's Persistent Felon Law to a total of twenty (20) years (TR 137-138, A 3-4).

A timely appeal was taken as a matter of right to the Supreme Court of Kentucky (TR 142). [RCr 12.02]. In the briefs filed by Randall Lamont Griffith in that court, he argued that the prosecutor's action deprived him of the right to trial by an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Section Eleven of the Constitution of Kentucky. The argument presented by the Petitioner noted a distinction between the rule introduced in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), for equal protection analysis and the requirements of the Sixth Amendment of the United States Constitution. Petitioner also argued that his

right to equal protection of the law was denied. Petitioner asked the Supreme Court of Kentucky to reverse the judgment and to order a new trial.

In an unpublished Opinion rendered on June 13, 1985, the Supreme Court of Kentucky rejected petitioner's argument holding that it was of the opinion "Swain disposes of this issue and we decline to go further than the Swain Court" (A 2). The judgment of the circuit court was affirmed (A 2).

REASON FOR ISSUANCE OF THE WRIT

> THE DECISION OF THE KENTUCKY SUPREME COURT CONFLICTS WITH McCRAY V. ABRAMS, A DECISION OF THE SECOND CIRCUIT COURT OF APPEALS. IMPORTANT FEDERAL QUESTIONS INVOLVING THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND THE FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION ARE SOLIDLY PRESENTED IN THIS CASE. THERE IS A CONFLICT OF AUTHORITY IN THE FEDERAL COURTS ON THIS QUESTION. FINALLY, THIS COURT HAS RECENTLY GRANTED CERTIORARI ON A VERY SIMILAR QUESTION IN BATSON V. KENTUCKY, 84-6263.

This case presents the important question of whether the Constitution allows a prosecutor to use peremptory challenges in jury selection solely on the basis of the prospective juror's race. The matter of improper use of peremptory challenges by a prosecutor is an issue that involves the Sixth Amendment of the United States Constitution because such challenges can result in a jury that does not represent the community and which may, therefore, prevent a trial before a fair and impartial jury. In Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975), the Court accepted as a necessary component of a fair trial a jury made up of a fair cross section of the community. Such a jury is required as a prophylaxis against arbitrary exercise of authority. [Taylor v. Louisiana, 419 U.S. at 530, 95 S.Ct. at 698]. Acknowledgment of this fundamental requirement has called into question the rule concerning peremptory challenges set out in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In that case, the Court held that the equal protection clause of the Fourteenth Amendment does

not afford a criminal defendant the right to question the prosecutor's use of peremptory challenges in any one case. [380 U.S. at 222, 85 S.Ct. at 837]. A presumption of rectitude was assigned to the prosecutor which could be rebutted only by a showing that the prosecutor over a period of years struck all blacks from jury panels. [380 U.S. at 223; 85 S.Ct. at 837]. In recent years, this rule has come under increasingly strident attack. The gist of these attacks has been

> There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can be struck because of their race by a prosecutor's use of peremptory challenges. [Dissent from denial of certiorari, McCray v. New York, ___ U.S. ___, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1332 (1983)].

The history of the United States gives ample support to the conclusion that minorities, blacks in particular, are subject to treatment based on racial stereotypes rather than individual characteristics and merit. The Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution bear witness to the existence of racial discrimination. The recent renewal of the Voting Rights Act of 1965 is further evidence of continued unequal treatment of blacks. [June 29, 1982, P.L. 97-205, 42 U.S.C.S. §1971 et. seq.]. It is, therefore, not surprising that the exclusion of blacks from juries by means of peremptory challenges exercised by representatives of the state creates the suspicion that racial stereotypes rather than individual unsuitability for jury service on a particular case are the motives for the challenges. It is necessary to have some reasonable means to probe the motives of the prosecutor. The means provided by Swain is not sufficient to the task. The requirement of showing a long term systematic exclusion of blacks is an insuperable obstacle to redress of constitutional rights. [McCray v. New York, dissent from denial of certiorari, 102 S.Ct. at 2440]. Without a determined effort by the defense bar, which tends to be composed of sole practitioners and small firms, the record keeping required to show the required "pattern of conduct"

in any one area likely cannot be done. In any event, the requirement of Swain is an excessive burden in light of the relief that customarily will be sought in cases where the prosecutor's challenges are questioned.

The common point of departure of the recent cases from the Swain rule is that the prosecutor will have to explain his actions where he has struck most or all of the members of a cognizable group and there is a likelihood that the members are being challenged only because they are members of the group. [People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); McCray v. Abrams, 750 F.2d 1113 (2 Cir. 1984)]. Once such a prima facie showing was made, the burden then shifts to the prosecution "to show if he can that the peremptory challenges in question were not predicated on group bias alone" People v. Wheeler, supra at 765. The right to an impartial jury made up of a fair cross section of the community is of sufficient importance to require adoption of a new rule to protect the right. The Court has impliedly recognized the need.

In 1983 the Court voted to deny certiorari in a group of cases collected under the name of McCray v. New York, _____U.S._____, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983). Two justices dissented, arguing that the petition should be granted for reasons similar to those presented in this Petition. [103 S.Ct. at 2439]. Three other justices agreed that the discriminatory use of peremptory challenges merited consideration but preferred to allow other Courts to consider the question in order to "enable us to deal with the issue more wisely at a later date." [103 S.Ct. at 2438].

A second reason for review is the conflict of opinion recently created in the federal court system. On December 4, 1985, the United States Court of Appeals for the Second Circuit rendered an Opinion styled McCray v. Abrams, 750 F.2d 1113 (1984), which held that Swain continued to control cases presented on equal protection principles, but that another approach based on

the Sixth Amendment to the United States Constitution was possible. That court held that discriminatory use of peremptory challenges by the prosecutor violated the right to trial by a jury composed of a fair cross section of the community. A two-part showing by the defendant was devised by which the defendant is required to show that the group that is challenged is "cognizable" and that there is a "substantial likelihood" that the challenge was based on group affiliation. If such a showing is made, then the prosecutor must show that his strikes were "racially neutral." Unless the prosecutor satisfies the trial court that permissible reasons motivated his peremptory challenges, the picked jury must be discharged and a new jury selected from a different panel.

It may readily be seen by referring to the recent cases of United States v. Thompson, 730 F.2d 82 (8 Cir. 1984) and United States v. Whitfield, 715 F.2d 145 (4 Cir. 1983), that McCray v. Abrams creates a conflict of authority in the federal courts. The Court should act to resolve this conflict.

Another important reason for review of this case is that state court decisions are in obvious conflict with a large number of states holding to the equal protection analysis of Swain v. Alabama, while some few states have changed to a principle of fair representation on a jury pursuant to the Sixth Amendment of the United States Constitution.

A review of cases decided since 1978, when People v. Wheeler was issued, shows that at least seven states have considered the Swain rule and its alternatives. (A table of these cases is found in the Appendix at page 13. The cases are compiled under the headings that follow).

Of the twenty-seven cases reviewed, fifteen (15) have reaffirmed adherence to Swain either by direct citation or by requiring evidence of long standing and systematic exclusion to justify relief. Of the fifteen states that have followed Swain, seven (7) chose the Swain rule in cases decided in 1981 and 1982. Indiana, Louisiana, and New York reiterated their already established allegiance to Swain. Four states would not or could

not decide the issue in the case that was presented. Two states decided cases on the ground that a defendant has no right to a particular jury. One jurisdiction, the District of Columbia, ruled that Wheeler and Soares were decided on state constitutional grounds and that, therefore, the federal constitution was not raised by the question of improper challenges.

Since 1978-1979 when Wheeler and Soares were decided, only New Mexico, Florida and Arizona have established new rules. New Mexico solved the problem by saying that its courts would consider arguments made pursuant to Swain or Wheeler-Soares. Florida adopted a new rule similar to Wheeler-Soares in 1984, as did New Jersey in 1985.

A final and important reason for granting certiorari in this case is the fact that this Court granted certiorari on April 22, 1985, in Batson v. Kentucky, No. 84-6263, which presents a very similar issue to the one at bar. In Batson, the petitioner asked the Court to consider whether a trial court errs in violation of the Sixth Amendment by swearing, over objection of a black defendant, an all-white panel after a prosecutor had exercised four of his six peremptory challenges to strike all of the black veniremen from the panel. This case presents a very similar question with one added twist. In this case, the prosecutor, Mr. Gutmann,[4] used his peremptories to strike four of the five black venireman. Thus, this case presents the scenario addressed in Commonwealth v. Soares in which the prosecutor struck most but not all members of the cognizable groups.[5] Petitioner's case squarely presents the inevitable question of tokenism as it relates to the discriminatory use of peremptories. Obviously, if this Court should hold in Batson that peremptorily striking all black members of a panel amounts to a prima facie showing that the peremptories were exercised on the impermissible basis of race, prosecutors could attempt to defeat inquiry into the motive behind

---

[4]As noted earlier, Mr. Gutmann was also the prosecutor in Batson who used his peremptories to strike all black venireman from the panel. In this case he struck four of the five black members.

[5]In Soares, the prosecutor had struck twelve of the thirteen black members of the venire.

strikes by leaving one or two blacks on a panel. Thus, it will be important in fashioning a test to take this tokenism account as other courts have done. To put an end to the use of peremptories by prosecutors based on race, this Court should adopt the standard for a prima facia case of the striking of most or all cognizable group members. This case allows the Court to directly address that question.

This case would make an excellent vehicle by which to settle the question of improper use of peremptory challenges. Most blacks were removed from the jury because of the prosecutor's peremptory challenges. The majority of the discrete group was removed from the jury. This raises the suspicion that the strikes were made for reasons of group association rather than the individual's lack of fitness to serve on the jury. For the reasons shown in this Petition, the Court is urged to grant the writ prayed for.

CONCLUSION

For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Kentucky Supreme Court.

Respectfully submitted,

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

JOANNE YANISH
ASSISTANT PUBLIC ADVOCATE
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

APPENDIX

CONTENTS

RENDERED: June 13, 1985
NOT TO BE PUBLISHED

Supreme Court of Kentucky

84-SC-1001-MR

RANDALL LAMONT GRIFFITH — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
82-CR-1449

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Randall Lamont Griffith was convicted of first-degree robbery and as a second-degree persistent felony offender. He was sentenced to a term of twenty years' imprisonment. We affirm.

Griffith asserts that the Commonwealth improperly struck blacks from the jury that tried him. The Commonwealth peremptorily excused four blacks and two whites. One black was excused by random selection by the clerk.

Griffith, a black, insists the Commonwealth must explain why peremptories were exercised against blacks. The Commonwealth's attorney denied race as a reason for striking,

and the trial court declined to discharge the jury. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), held that the striking of all blacks from a jury panel in a particular case is not a denial of equal protection. We are of the opinion Swain disposes of this issue, and we decline to go further than the Swain court.

Griffith next asserts that the trial court erroneously permitted witnesses for the prosecution to testify as to their identification of Griffith and in permitting police officer witnesses to also testify as to the witnesses' identification of Griffith. We have examined the authorities cited and conclude this testimony was not erroneously admitted.

The judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

JoAnne M. Yanish
Assistant Public Advocate
151 Elkhorn Court
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLEE:

David L. Armstrong
Attorney General

David Martin
Assistant Attorney General
State Capitol
Frankfort, Kentucky 40601

JEFFERSON CIRCUIT COURT
NINTH DIVISION
JUDGE KEN G. COREY

NO. 82CR1449

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS JUDGMENT AFTER JURY TRIAL

RANDALL LAMONT GRIFFITH DEFENDANT

The defendant at arraignment having entered a plea of not guilty to the following charges included within the indictment, Count 1, Robbery I, Count 2, T.B.U.T. U/100.00, dismissed; Count 3, P.F.O. II and having on the 15th day of May, 1984, appeared in open court with his attorney Honorable Leo Smith, the case was tried before a jury which returned the following verdict: VERDICTS UNDER INSTRUCTION NO. 1, ROBBERY IN THE FIRST DEGREE: WE, THE JURY, FIND THE DEFENDANT, RANDALL LAMONT GRIFFITH, GUILTY UNDER INSTRUCTION NO. 1, AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR TEN YEARS. /S/ STEVEN L. NELSON, FOREPERSON.

After the jury returned their verdict of guilt, the second phase of the trial began; the defendant being charged as a P.F.O. II. Evidence was heard and the jury returned the following verdict: VERDICTS UNDER INSTRUCTI NO. 1 PERSISTENT FELONY OFFENDER IN THE SECOND DEGREE: WE, THE JURY, FIND THE DEFENDANT, RANDALL LAMONT GRIFFITH, GUILTY UNDER INSTRUCTION NO. 1, and fix his punishment at confinement in the penitentiary for Twenty Years, in lieu of our previous recommendation. /S/ STEVEN L. NELSON, FOREPERSON.

Pursuant to KRS. 532.052, the court, having explained the defendant's right to a presentence investigation report, the defendant, in person and by counsel, expressly waived such right and requested that the Court proceed

with sentencing immediately.

No sufficient cause having been shown why judgment should not be pronounced, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the following charges: COUNT 1, ROBBERY I, COUNT 3, P.F.O. II and is Sentenced to 10 Years on Count 1, enhanced to 20 Years on Count 3, fo a total of 20 years in Bureau of Corrections.

IT IS FURTHER ORDERED that the defendant shall not be entitled to bail and that the sheriff of Jefferson County deliver the defendant to the custo of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED THAT the defendant is hereby credited with time spent in custody prior to sentence, namely as many days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

JUDGE KEN G. COREY

ATTESTED: A TRUE COPY
PAULIE MILLER, CLERK
BY Debbie Moore D.C.

CC: LEO SMITH
JOE GUTMANN

ENTERED IN COURT
MAY 21 1984
PAULIE MILLER, Clerk
By Deputy Clerk

left, waive the calling of the roll?

MR. GUTMANN: Yes, your Honor.

MR. SMITH: Yes, Judge.

THE COURT: All right, as soon as Miss Moore goes there here paper work here, we'll seat the Jury.

MR. SMITH: Judge, approach the bench while we're waiting on that, I think it will same some time, in order to save some time, I'll go ahead and bring this up now.

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. SMITH: I have no idea what, in terms of race, the jury is going to consist of. If, by chance, we got an all white jury, I'm going to as that the Court, before discharging the rest, put on the record as to whether or not Mr. Gutmann exercised his strikes as to whether or not the person was black and if so, I think case law gives me the right to have him state for the record the reasons and I'll bring that up now so I don't have to run up after the jury is selected.

MR. GUTMANN: Mr. Smith, I consider that very offensive.

MR. SMITH: Well, needless to say...

MR. GUTMANN: Judge, I want to take exception to that.

THE COURT: Okay.

MR.SMITH: I have no choice but to make

to make that objection.

THE COURT: Just tell me now, did you strike any member of the panel because of their race?

MR. GUTMANN: No, I did not.

THE COURT: Okay. That's sufficient.

MR. SMITH: All I ask, we can wait and if we end up impaneling some blacks, there will be no issue. I have no idea, I simply ask for purposes of the record because it does not indicate race as to how many strikes that we simply list that, does that make sense?

THE COURT: No.

MR. GUTMANN: Mr. Smith, did you strike any whites because they are white?

MR. SMITH: As Mr. Gutmann is aware, this is not and unusual motion being made whether with him or any other prosecutor. Matter of fact, it's only recently, based on the fact that you end up often times with these all white juries and the defendants are very sensitive to that. Mr. Griffith, I think, is very sensitive to that and essentially wanted me to make this particular motion. I'm going to do it because I think I have to under case law and all I said, so the record is sufficient if it goes up on appeal, if we sit some blacks, there's not an issue, okay? And, we can forget about it. If we don't, all I ask is to have Mr. Gutmann state the reasons for the strike, if you seen them outside before, if you do, then it's not there in terms of appeal and I think case law says you've got to make a record on this issue.

THE COURT: What do you want me to do? Ask him on the record in front of the panel?

MR. SMITH: Judge, all we have to do is take a seat and wait until the jury is selected.

THE COURT: There's a couple of folks on that panel that you can't tell. Are you going to ask them?

MR. SMITH: Here's my suggestion, you seat 13, if there is some seated, then we don't have any problem, we forget about it. If there aren't, then you can go ahead and send for lunch and I don't have any problem with that at all. At that point, I'm not going to make my objection and ask Mr. Gutmann to state for the record why he struck who he struck.

THE COURT: It will taint their future service as jurors. Okay. Let's see if we've got any problems.

THE CLERK: I'm ready.

THE COURT: Okay, go ahead.

(WHEREUPON, the Clerk called 13 jurors to try this case and Court continued as follows:)

THE COURT: Okay. Get me the two strike sheets.

(WHEREUPON, the Court called the names of the people who had been struck and Court continued as follows:)

THE COURT: Okay. You folks are excused. We may see you during pendency of your terms. Thank you very much. I'm going to swear the Jury and then we'll

break for lunch.

(WHEREUPON, THE jury panel was placed under oath and recessed for lunch and the following motions were had out of the hearing of the jury:)

THE COURT: Okay. Let's go on the record. Okay, in view of Mr. Smith's comments, as I called the roll of the struck jurors, I find that the defense struck, Patricia Ballard, 146, white; Mary Miller, 186, white: Opal Moore, 34, white; Charles Mattingly, 168, white; Richard Dolan, 21, white; Roger Blackburn, 180, white; Richard Atkinson, 186, white; Oliva Williams, 177, black: Neal McWaters, 211, white. And that the Commonwealth struck: Robert Givens, 202, black: William Payne, 210, black: Glen Taylor, 53, white; a double strike for Mr. Atkinson, also by the Commonwealth, white; Gerry Young, 204, black; and another double strike, Olivia Williams, 137, black. What says the defendant now, sir?

MR. SMITH: Judge, we'll renew our motion and I'll state for the record...

THE COURT: Renew your motion for what, please, sir?

MR. SMITH: Well, specifically, we're moving that the Court discharge this panel and we start over again based on my client's rights to a fair cross section of the community. For the record, no black is seated, the defense struck one black person, the reasons are not only the victim but the defendant in the burglary in chief, as to their particular reasons, on the record, as to their striking of the five members of the race of the defendant and that's our motion.

THE COURT: Mr. Gutmann?

MR. GUTMANN: Your Honor, I would, at ...I would like the record to reflect that Mr. Smith did strike one black and 8 whites. I did not strike all the blacks from the jury. Is the Court requesting that I state on the record why I struck each person?

THE COURT: No, I'm not going to request that. Does the case law state that he has to state affirmatively why he struck as opposed to negatively that he struck not because of race?

MR. SMITH: I think he has to and if the Court wants to do this...

THE COURT: Do you want to show me the authority for that?

MR. SMITH: ...if the Court wants to do this, we can break for lunch and then I'll bring some case law.

THE COURT: Do you want to go with it right now and state your reasons right now?

MR. GUTMANN: Well, your Honor, you know, I don't feel that that's my obligation for the same reason that Mr. Smith is not required to state why he struck certain people. I mean, I struck a young while male for the same reason I struck a young black male...a young black female and that's because they're young and studies have shown that they are less law and order citizens. You know, I obviously don't want jurors in the same age category as Mr. Griffith, that's one of my primary considerations and I struck Mr. Atkinson due to his occupation, a liberal occupation being an art director.

THE COURT: Okay. Objection denied subject to case law. You may show me when we return.

MR. SMITH: Okay. I assume that this Court is not going to require our motion to be specific as to the blacks that were struck.

THE COURT: Not unless you have some case law. Court is adjourned.

(WHEREUPON, Court recessed for lunch and the following discussion was had before the jury returned to the court room:)

MR. SMITH: Is the Court going to rule on our motion?

THE COURT: Motion denied.

MR. SMITH: Is the Court overruling our motion...denying our motion for the Commonwealth to be specific as to the reasons the black members were struck from the panel?

THE COURT: Well, you said you had some authority.

MR. SMITH: Well, my moiton, irregardless, but, in fact, I will try to get some.

THE COURT: Motion denied, irregardless, subject to renewal if you have case law, okay?

MR. GUTMANN: Thank you.

MR. SMITH: Okay. Judge, for the record, I'll renew my prior motion for discharging this panel and starting over. I think my client's rights according to the Federal Constitution sixth and fourteenth amendments State Section 7 and 1 to a fair cross section of the community has been violated. There are three ...I have been able to obtain, the case of the People v. Hall, 1983, it's in the 34th criminal law reporter, 2259 and that's in 1984, where it says, People v. Wheeler which is 22 Cal3r,

263 and case it recites is 573, second 481968, and then there's a Massachusetts case Commonwealth versus S-o-a-r-e-s, 377 Mass 461, recites389 ne 2nd 499, 1979 case. It's a New Mexico case, C-r-e-s-p-in, 94 New Mexico, 486, and the rest of the cite 612, one Federal case MacCray, M-a-c C-r-a-y versus A-b-r-a-m-s, out of the eastern district of New York, 1983, 34 criminal law reporter, 2441984, preemptories cannot be exercised soley on the basis of race and as the Court knows, the defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury and the Court has to find out how the preemptories were exercised and the defense counsel does not have to state it because this is a different situation for the defendant.

THE COURT: Let me ask you something before you go on. Are you aware of the fact that the Commonwealth did not strike all blacks. There was at least one who was not chosen merely by randum selection of the Clerk?

MR. SMITH: I'm aware of that, your Honor. And, I'm aware that the Court was going to put that information into the record when we got back from lunch.

THE COURT: Okay.

MR. SMITH: I belive there were at least three, three out of six that were black and that left one and I don't think a token black situation can cure it. For the record, I'd ask the Court to discharge this jury or at least make Mr. Gutmann put in the record the specifics at least as to each one.

THE COURT: Okay. Both motions denied. Okay.

MR. GUTMANN: Thank you, Judge.

MR. SMITH: Thank you.

THE COURT: Okay, let's have the jury, sir.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and also completes the voir dire and motion portion of this transcript.)

STATE OF KENTUCKY

COUNTY OF JEFFERSON

I, SHARI WILLIAMS KATTUS, Official Court Reporter for the Jefferson Circuit Court, Division Nine, do hereby certify that the proceedings represent a true, correct and complete transcript of the voir dire and pre-trial motion portion of this trial.

WITNESS MY HAND THIS 6th day of January, 1985.

SHARI WILLIAMS KATTUS,
COURT REPORTER, NOTARY.

CASES CITED SINCE 1978

A. FOLLOWING SWAIN V. ALABAMA

1. Mitchell v. State, Ala.Cr.App., 450 So.2d 181 (1984)
2. State v. Wiley, Ariz., 698 P.2d 1244 (1985)
3. Blackwell v. State, Ga., 281 S.E.2d 599 (1981)
4. People v. Payne, 75 Ill. Dec. 643, 457 N.E.2d 1202 (1983)
5. Swope v. State, 263 Ind., 476, 325 N.2d 193 (1975)
   Hoskins v. State, Ind., 441 N.E.2d 419 (1982)
6. Commonwealth v. McFerron, Ky., 680 S.W.2d 924 (1984)
7. State v. James, La.Cr.App., 459 So.2d 1299 (1984)
   State v. Brown, La., 371 So.2d 751 (1979)
8. Lawrence v. State, Md.App., 444 A.2d 478 (1982)
9. State v. Hurley, Mo.App., 680 S.W.2d 209 (1984)
10. People v. McCray, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982)
    People v. Charles, 61 N.Y.2d 321, 473 N.Y.S.2d 941 (1984)
11. State v. Shelton, N.C.App., 281 S.E.2d 684 (1981)
12. Lee v. State, Okl.Cr., 637 P.2d 879 (1981)
13. State v. Raymond, R.I., 446 A.2d 743 (1982)
14. State v. Thompson, S.C., 281 S.E.2d 216 (1981)
15. State v. Wooden, Tenn.Cr.App., 658 S.W.2d (1983)

B. NO DETERMINATION MADE

16. Mallott v. State, Alas., 608 P.2d 737 (1980)
17. People v. Smith, Colo.App., 622 P.2d 90 (1980)
    People v. Siemien, Colo.App., 671 P.2d 1021 (1983)
18. Saunders v. State, Del.Supr., 401 A.2d 629 (1979)
19. Commonwealth v. Futch, Pa., 424 A.2d 1231 (1981)

C. NO RIGHT TO PARTICULAR JURY

20. Walton v. State, 279 Ark. 193, 650 S.W.2d 231 (1983)
21. Booker v. State, Miss., 449 So.2d 209 (1984)

D. FEDERAL CONSTITUTION NOT INVOLVED

22. Doepel v. United States, D.C. App., 434 A.2d 449 (1981)

E. NEW RULES

23. People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)

24. Commonwealth v. Soares, 377 Mass. 461, 387 N.Ed.2d 499 (1979)

25. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980)

26. State v. Neil, Fla., 457 So.2d 481 (1984)

27. State v. Gilmore, 19 N.J.Super. 389, 489 A.2d 1175 (1985)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS. NOTICE OF APPEARANCE

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * * *

The Clerk will enter my appearance as counsel for Randall Lamont Griffith, who in this Court is the petitioner. I certify that I am a member of the Bar of the Supreme Court of the United States. The Clerk is requested to notify the undersigned of action by this Court by regular mail.

Larry H. Marshall
LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-5231

NO. _____

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * *

The Petitioner, Randall Lamont Griffith, asks leave to file the attached Petition For a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner was permitted to proceed as an indigent by the Supreme Court of Kentucky. The petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH, — PETITIONER

VS.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY, — RESPONDENT.

* * * * *

I, Randall Lamont Griffith, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my Motion to proceed on Appeal without being required to pre-pay fees, costs, or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the Appeal are true.

1. Are you presently employed?

No. I was last employed at Dickerson & Harper Sanitation, Louisville, Kentucky, in 1982 where I earned approximately $644.00 per month.

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

No.

3. Do you own any cash or checking or savings accounts?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No one.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Randall L. Griffith
RANDALL LAMONT GRIFFITH

SUBSCRIBED AND SWORN to before me by Randall Lamont Griffith on this the 5th day of August, 1985.

Lynn A. Murphy (Aldridge)
NOTARY PUBLIC, KY. STATE-AT-LARGE
My Commmission expires: 12-4-85

NO.

RANDALL LAMONT GRIFFITH PETITIONER

VS. CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * * * * * *

I, Larry H. Marshall, counsel for petitioner, hereby certify that the attached Petition For Writ of Certiorari, Appendix, Notice of Appearance, and Motion For Leave to Proceed In Forma Pauperis were served on respondent by hand-delivering copies of the aforementioned documents, on August 9, 1985, to respondent's counsel, David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601.

Larry H. Marshall
LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH — PETITIONER

VS. — AFFIDAVIT PURSUANT TO SUPREME COURT RULE 28(2)

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * *

I, Larry H. Marshall, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel for petitioner in the above-styled action.

3. The attached Petition for Writ of Certiorari, Appendix, Notice of Appearance, Motion For Leave To Proceed In Forma Pauperis, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Alexander L. Stevas, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543.

5. To my knowledge, the mailing of the aforementioned documents took place on August 9, 1985, which is within 60 days of the June 13, 1985, date that the Supreme Court of Kentucky affirmed petitioner's conviction.

Larry H. Marshall
LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR PETITIONER

Subscribed and sworn to before me by Larry H. Marshall, this 9th day of August, 1985.

Elaine Lee Simpson
Notary Public, State at Large

My Commission expires: July 21, 1987